

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,

8:06CR99

Plaintiff,

vs.

RAYMOND C. WHITBECK, SR.,

Defendant.

MEMORANDUM AND ORDER

This matter is before the court for initial review of the defendant's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody, Filing No. 119. The defendant also filed four affidavits in support of his motion. *See id.* Rule 4(b) of the *Rules Governing Section 2255 Proceedings for the United States District Courts* requires initial review of the defendant's § 2255 motion. Rule 4(b) provides:

Initial Consideration by the Judge. The judge who receives the motion must promptly examine it. If it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the judge must dismiss the motion and direct the clerk to notify the moving party. If the motion is not dismissed, the judge must order the United States attorney to file an answer, motion, or other response within a fixed time, or to take other action the judge may order.

The record indicates that the defendant plead guilty to Count I of an Indictment charging the defendant with conspiracy to distribute a controlled substance in violation of 21 U.S.C. § 846. *See* Filing No. 106, Amended Judgment in a Criminal Case. The court sentenced the defendant to the custody of the Bureau of Prisons for 188 months followed by 5 years supervised release. *See id.* The defendant did not file a direct appeal.

In his § 2255 motion, the defendant alleges that his attorney did not allow him the opportunity to read his presentence investigation report (PSI), submit his version of the offense, or make him aware of all of the questions in the PSI. The defendant also alleges

that due to his cooperation with the police, he was to receive a downward departure in his sentence by the U.S. Attorney. The defendant further requests that this court appoint an attorney to his case and hold an evidentiary hearing on the issues presented in his motion to vacate.

It does not plainly appear from the motion and the record of prior proceedings that the defendant is not entitled to relief. Therefore, I will order the United States to respond by answer to the defendant's claims. In addition to any other matters discussed in the answer, the United States shall address whether any of the defendant's § 2255 claims are barred, for example by waiver and/or untimeliness.

THEREFORE, IT IS ORDERED:

1. That upon initial review, the court finds that summary dismissal of the defendant's § 2255 motion is not required.
2. That by December 13, 2007, the United States shall file an answer to the defendant's § 2255 motion, supported by a brief.
3. That by January 11, 2008, the defendant may file a reply brief.
4. That the court will rule on the defendant's request for an evidentiary hearing, request for an attorney to be appointed in his case, and request for free transcripts (Filing No. 120) after the court receives an answer by the United States as to the defendant's claims.

DATED this 19th day of November, 2007.

BY THE COURT:

s/ Joseph F. Bataillon
Chief District Court Judge